

УДК 342.038

I. Kononchuk

Notion and Legal Nature of Amparo Procedure

The article evaluates the legal nature of the amparo procedure. The main principles and characteristics of amparo procedure as the specialized institute of constitutional control are examined. It was defined that amparo procedure is the effective institute of constitutional control and the effective method of protection of the Constitution, the rights of the human and the citizen.

Key words: amparo procedure, constitutional control, main rights and freedoms of the human and citizen, models of constitutional control.

Formulation of the scientific problem and its significance. The institute of constitutional control functions in the majority of the modern democratic states. The establishment of one of its model or another depends on the peculiarities of the national law, organization of the state power and economic, political and historical conditions.

The research of different aspects of establishment and development of the institute of institutional control in the foreign countries is necessary for learning their positive experience and the possibility to use it for the development and improvement of the constitutional control organs of our country. Not only American and European models of legal constitutional control are interesting, but also the mixed forms of constitutional control.

The analysis of the researches on this problem. The following national jurists and scientists researched some theoretical and practical aspects of formation and development of the institution of constitutional control in the world: V.O. Hergelijnyk, I.I. Maryniv, O.S. Lotiuk, S.V. Piliuk, M.D. Savenko, A.O. Selivanov, V.E. Skomoroha, I.D. Slidenko, M.V. Teslenko, A.P. Tkachuk, T.O. Tsymbalysty, V.M. Shapoval and others.

Formulation of the aim of the study. The purpose of this article is to research the notion and characteristics of «amparo procedure» as the specialized institute of the constitutional control.

The presentation of the main material and justification of the results of the study. The amparo procedure cannot be identified neither with American nor with European model of constitutional control. It protects only the constitutional rights and freedoms, while the American system provides the possibility of appealing to the court in terms of the violated rights, enshrined both in the Constitution as well as in the other regulatory legal act. Amparo is similar in many ways with the European model. In particular, as with the request for the protection according to the European model, amparo procedure gives the possibility to appeal against any act of the public authority: law, administrative act, decision of the court. At the same time, it does not cause the annulment of any act according to its unconstitutionality [1, p. 131]. The peculiarity of the amparo procedure is also the character of its decisions. They should only concern the parties involved in the case and should not contain the general statements concerning the act that was the reason of the opening of the amparo procedure.

The amparo procedure first appeared in Mexico at the end of the 19th century. The term «amparo» originates from the Spanish word «amparar», which literally means to protect, to guard. It was enshrined in the project of the Constitution for the Yucatan in 1840 by its developer Manuel Rehon. In this project, the term «amparo» meant the right of the supreme court of the country to protect the people, whose rights were violated by law or governmental acts. Factually, the Constitution of the Yucatan state introduced the judicial constitutional control – the amparo procedure, later incorporated into the federal Constitution of 1857, the current Political Constitution of 1917 as well as in the Organic law about amparo of 1936 with amendments and additions that regulate the procedure for the implementation of the constitutional judicial proceedings under the amparo procedure on the present stage [2, p. 104]. The procedure of amparo in Mexico gives people the possibility to protect own rights in the courts, if these rights are violated by the administrative or judicial act.

The Constitutional control that is realized according to the amparo procedure is common for numerous Latin American countries, however it takes its origins in the classical variant in Mexico. The 1917 Constitution of this country defines the following constitutional principles of amparo procedure: initiatives of the parties, the presence of the personal direct harm of the injured party that should be caused in the form

prescribed by the law, the administration of justice within the amparo procedure only by the court, relativity of the decisions, finalization of the amparo procedure.

Amparo procedure is the institute of constitutional control. It seeks to protect the principles of Basic Law. Its main goal is the protection of the constitutional rights of the human and the citizen. The constitutional control in Mexico is realized by the courts of the general jurisdiction.

Amparo procedure, as a specialized institute of the constitutional control has the range of peculiarities. Thus, the complaint about the verification of the constitutionality of laws or other legal acts may be filled by any natural person or legal entity. Its main argument should be the violation of the rights guaranteed by the constitution. At the same time, its main goal should be the exemption of the person from application of this act. The constitutional check of the normative act should be realized through the open trial, where the plaintiff and the responsible state authority that issued this normative act are the parties. The decision made by the authorized court concerning the verification of the functionality of the impugned regulations is obligatory only for the parties that take part in this process [3, p. 45].

The procedure for the specialized justice is divided into direct and indirect amparo. The first is the type of judicial constitutional control, according to which the review of the case involving the recognition of the unconstitutional character of the normative act of the organ of the state power or the local government (as well as actions of the officials of the federal, regional and municipal levels) is realized directly by the Supreme court of the country or district collegial courts. The case should be considered for the first time in the courts. The indirect amparo is the review of the decisions made in appeals by the regional local courts (criminal, civil, administrative and labor) in the Supreme Court and District Collegiate Courts.

In accordance with article 94 of the Constitution of Mexico, the Supreme Court of Mexico, Collegiate Circuit Court, and local district courts consider Amparo's appeal. Supreme Court judges are appointed by the president and approved by the Senate (Article 96 of the Constitution of Mexico). The main powers of the Supreme Court are the recognition of the unconstitutionality of a law or by-law, as well as a review of the decisions of courts in matters of direct amparo [4, p. 287].

Collegiate Circuit Courts include three professional judges, a secretary-consultant, several notaries, secretaries and employees who help them with their activities. Courts deal with cases through the writ of amparo (direct amparo), as well as appeals against district courts in amparo cases.

District local courts include one professional judge, several secretaries, notaries and employees. One of the main powers of the court is to consider, through the writ of amparo a statement on appeals against judicial decisions in criminal cases, acts of local authorities that violated the freedom of a private person, as well as a number of other issues in the area of civil, criminal and labor legislation. A complaint under the writ of amparo may be filed to the district court only in relation to the normative act of the public authority or local government, which by its nature cannot make the final decision in the civil, criminal, administrative or labor disputes. The final decisions on cases of a substantive nature may be appealed only to the Collegiate Circuit Court or the Supreme Court.

Nowadays, the writ of amparo has evolved and exists in the following forms in the Mexican legal doctrine: amparo, as a tool to protect the constitutional rights and freedoms of the person and the citizen; amparo against laws; amparo-cassation: reviewing of the legality of the court decision as the last instance for all courts; administrative amparo [3, p. 45].

The state authorities or bodies of local self-government, whose competence is violated by the actions of the second-level public-authority institute, have the right to appeal according to the writ of amparo. The peculiarity of the statement on the violation of the writ of amparo is that its subject is always the requirement of the applicant to cancel the unconstitutional act or to terminate the action of the state authority that contradict the basic law or the requirements concerning the prevention of the adoption of such an act or the execution of such act [5, p. 48].

The significant element of the Mexican amparo procedure is the institution suspending the disputed act. Even though under amparo procedure such act cannot be applied to the applicant, this institute provides the citizens more possibilities and guarantees to protect own constitutional rights, ensures the implementation of the Constitutional legality and prevents the negative consequences of its violation.

Public trials are conducted by the parties, the plaintiff and the responsible authority that issued the judicial act. Written explanations from the parties involved in the case and the written report of the prosecutor should be prepared and submitted to the court prior to the commencement of consideration of the case.

Besides the applicant, the responsible authority and the third person, the prosecutor's office is also the party in the constitutional proceedings. According to the Mexican law, there are no criteria for the participation of the prosecutor in the amparo procedure, thus it is not obligatory and it can be applied upon

decision of the attorney general. The prosecutor's office in the constitutional proceedings does not have the same amount of the procedural authority as applicant or the responsible authority. In particular, it does not have the right to apply for review of the decision on the outcomes of the case. However, defining the status of the prosecutor's office in amparo proceedings, the academics are calling to be guided by those statements of the Mexican Constitution which state that the prosecutor may not be involved in the proceedings of the case [5, p. 47].

Mexican law does not provide the time limit, according to which it is necessary to make and announce the decision concerning the case. At the same time, the requirements towards the content of the final decision that is made according to the constitutional proceedings are set. It should contain: 1) the exact description of the impugned act and the evaluation of the proofs presented by the parties; 2) the legal grounds justifying the lawfulness of postponement of the consideration of the case, as well as the conclusion on the constitutionality or not constitutionality of the impugned act; 3) the clearly formulated decision in the case specifying the act that was the reason of the opening of the constitutional proceedings.

In the course of the case, the local district court or district collegial court officially informs the public authority concerning the taken decision in order to enforce the court decision by the latter. The liability for non-enforcement or improper enforcement of the decisions of the court exists on the legislative level. It is also controlled by the prosecutor's office. If during 24 hours from obtainment of the court decision by the authority it will not be completed, the district judge or collegial district court will take coercive measures to the responsible party. The organ of the state power as well as its subordinated organs that did not comply with the court decision bear the same responsibility. The failure to comply with the court decision according to amparo procedure means the immediate removal of people from the occupied posts in the organs of the state power.

The decisions of the court are individual, they do not formulate the law or the general norms for the similar cases. According to amparo procedure, the court cannot declare the legal act as not valid, if it does not correspond to the constitution. The disputed normative act is considered unconstitutional only in respect to the subject, whose rights were violated and who applied to the relevant compliant court. Consequently, this fact does not exclude the possibility of applying with the relevant statement of appeal under amparo procedure of the same normative act and according to the same reasons, but with the other subjects.

On the contrary to Mexico, where amparo procedure is considered classical and is realized by the courts of the general jurisdiction, Spain has other model of this procedure. It is carried out by the specialized judicial body – Constitutional court.

According to article 162 of the 1978 Constitution of Spain, «any individual or body corporate with a legitimate interests as well as the Defender of the People and the Public Prosecutor's Office» have the right to apply for the amparo procedure to the Constitutional Court of Spain [6].

In Spain, amparo procedure is not applied to laws. At the same time, in the case if the application for the protection is considered as a result of the fact that the law that is applied is detrimental to the main rights and public freedoms, the chamber of the court that took the application for consideration refers this matter to the plenum, where the decision may be made on the unconstitutionality of this law.

Protection of the constitutional rights and freedoms is realized through appealing against orders, legal acts or any acts of public authority of the state, regional autonomous association and other state territorial entities, corporate institutions or establishments, as well as their employees and agents. The constitutional rights and freedoms that were directly violated by activity or inactivity of the court are also subject to protection.

At the same time, the mandatory condition for accepting the statement of violation of the constitutional law is the exhaustion of the possibilities of their protection through filling the applications with ordinary judicial bodies. This requirement also applies to cases, where action or inactivity of judicial body is appeal according to amparo (that is when the possibilities of appeal or cassation appeal are exhausted).

In the Spanish model of amparo procedure there are certain limitations concerning the rights that should be protected. In particular, economic and social rights are not subject to protection. These rights in Spain are protected by the courts of the general jurisdiction. The majority of appeals are related to the protection of rights and freedoms, violated by the legal decisions or actions or inactivity of judicial bodies. When the Constitutional Court Chamber of Spain considers the application on the protection of the rights, filled in the connection with the decision of the judge or court of the general jurisdiction, it is limited to the establishment of the violation of the rights and freedoms of the applicant, the protection against encroachment of these rights or freedoms or their restoration, while the chamber shall refrain from consideration in any form of action of the judicial bodies.

It is also important to mention the institute of revision of the Constitutional Court of Spain of its

constitutional doctrines, developed during the exercise of the protection of the fundamental rights and freedoms. When one of the chambers of the court considers necessary to step back to any point from the previous constitutional doctrine of the court, this question is referred for solution to the Plenum of the Court.

In the Spanish model of the amparo procedure mechanism for suspending the execution of an act of the public authority that resulted the submission of the application about the constitutional protection is properly worked out (suspension occurs when completion of the act is detrimental and impedes the full protection of the rights; suspension may be refused if such act would severely damage the general interests or basic rights and public freedoms of the third person; in case of suspending the execution of rights the bail guarantee may be applied; if the suspension of the act brings serious harm to the rights of the third persons the pledge can be applied on the sum, that is enough to redress). Also, it is predicted that the decision to stop the execution of the act may be revised under the new circumstances or in relation to the conditions that were not known at the time of suspension decision [6].

Constitutional Court of Spain can independently determine who must comply with its decisions and if necessary to determine the conditions of its execution. The court may impose significant fines and if necessary to determine the conditions of its execution. The court may impose the significant fines on any person that does not comply with its requirements within the specified time period. In this case, the fines may be imposed repeatedly until the requirements of the parties are duly fulfilled. The imposition of fines does not exclude any other liability that may arise.

Conclusions. The Institute of Constitutional Control at the present stage acquires universal characteristics. It is connected with the use of the best achievements of other varieties, taking into account political and legal factors of state development on the basis of one model of constitutional control. However, each of them must provide the main purpose of the Institute of Constitutional Control – to protect the Constitution and laws of the state, as well as human and civil rights and freedoms.

The following specific characteristics are common for the writ of amparo: constitutional control is performed by constitutional courts and courts of general jurisdiction; the right of initiative to apply constitutional control is granted only to participants in the court proceedings; the purpose of a complaint is to verify the constitutionality of laws or other legal acts to relieve a person from the application of this act to him/her; a court decision is mandatory only for the parties of the current dispute and does not contain general norms for similar cases.

The writ of amparo is an effective tool to protect the Constitution, human rights and citizens and an effective institute of constitutional control.

Sources and Literature

1. Maklakov V.V. Constitutional law of foreign countries. General part: [textbook for students of law high-schools and departments] / V.V. Maklakov. – M.: Wolters Kluwer, 2006. – 896 p.
2. Klishas A.A. Constitutional Justice in Foreign Countries / A.A. Klishas. – M.: International relations, 2004. – 288 p.
3. Lotiuk O.S. Legal protection of the constitution in foreign countries / O.S. Lotiuk // Scientific Journal of Chernivtsi University, 2007. Issue 375: Jurisprudence. – P.p. 42-46.
4. Mexican United States: Constitution and Legislative Acts / Editor, author of the introductory page O.A. Zhidkov; editors: V.A. Tumanov, et al.; translator V.V. Bezbach, et al.; under the guidance F.A. Oganezova. – M.: Progress, 1986. – 480 p.
5. Klishas A.A. Constitutional Justice in Mexico. The specificity of the proceedings within the «writ of amparo» / A.A. Klishas // Law and Politics. – 2004. – № 2. – P. p. 43-57.
6. Constitución Española, 1978 [Electronic resource]. – Mode of access: <http://www.senado.es/web/conocersenado/normas/constitucion/index.html>.

Конончук І. Поняття та правова природа процедури ампаро. У статті досліджено поняття та правову природу процедури ампаро. Охарактеризовано принципи й особливості процедури ампаро як спеціалізованого інституту конституційного контролю. Визначено, що процедура ампаро – ефективний засіб захисту Конституції, прав людини та громадянина й дієвий інститут конституційного контролю. Конституційний контроль, що здійснюється в режимі процедури ампаро, характерний для багатьох латиноамериканських країн, однак у класичному варіанті вона сформувалася саме в Мексиці. На відміну від Мексики, де процедура ампаро вважається класичною і здійснюється судами загальної юрисдикції, в Іспанії діє інша модель цієї процедури. Вона здійснюється спеціальним судовим органом – Конституційним судом.

Ключові слова: процедура ампаро, конституційний контроль, основні права і свободи людини та громадянина, моделі конституційного контролю.

Конончук И. Понятие и правовая природа процедуры ампаро. В статье исследовано понятие и правовая природа процедуры ампаро. Охарактеризованы принципы и особенности процедуры ампаро как специализированного института конституционного контроля. Определено, что процедура ампаро – эффективное средство защиты Конституции, прав человека и гражданина, действенный институт конституционного контроля. Конституционный контроль, осуществляемый в режиме процедуры ампаро, характерен для многих латиноамериканских стран, однако в классическом варианте она сформировалась именно в Мексике. В отличие от Мексики, где процедура ампаро считается классической и осуществляется судами общей юрисдикции, в Испании действует другая модель этой процедуры. Она осуществляется специальным судебным органом – Конституционным Судом.

Ключевые слова: процедура ампаро, конституционный контроль, основные права и свободы человека и гражданина, модели конституционного контроля.